

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

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Amendment of Part 20 and 24 of the)
Commission's Rules -- Broadband)
PCS Competitive Bidding and the)
Commercial Mobile Radio Service)
Spectrum Cap)

WT Docket No. 96-59

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Amendment of the Commission's)
Cellular PCS Cross-Ownership Rule)

GN Docket No. 90-314

REPLY COMMENTS OF RENDALL AND ASSOCIATES

Rendall and Associates (RAA) hereby respectfully submits these reply comments in response to the above-captioned Notice of Proposed Rule Making ("Notice") (FCC 96-119) released March 20, 1996. In these reply comments, RAA responds to four specific areas addressed in the comments filed in response to the Notice. First, we argue that tighter eligibility requirements for bidding in the F block will not resolve the problem of heavily-financed bidders dominating the auction, as seen in the C-block auction, and we propose an effective solution based on a limit on POPs. Second, we argue that the provisions available to small businesses in the C-block auction be extended not only to the F-block, but also to small business bidders in the D and E blocks, as well. Third, we argue that any change in the spectrum aggregation limits at this point would invite legal challenges and result in substantial delays in

auctioning the 10 MHz licenses. Fourth, we argue that the auction for F-block licenses be held prior to or concurrent with the auction(s) for the D and E blocks.

I. Introduction

In the comments filed in response to the Commission's March 20, 1996 Notice, a large majority of the respondents argued that the C-block auction has not worked as intended to "provide meaningful opportunities" to small businesses and rural telephone companies "to participate in the provision of broadband PCS".¹ Thus, despite its best intentions, the Commission has thus far been unable to meet its Congressional mandate to "ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses to a wide variety of applicants, including small businesses [and] rural telephone companies".² Fortunately, the Commission has the opportunity to correct these problems prior to commencing the auctions for the last remaining PCS spectrum, the D, E, and F blocks by adopting several of the recommendations made in the comments filed in response to the Notice and highlighted in our reply comments.

Of those arguing that the C-block auction has not worked as intended, a majority argued for stricter rules for eligibility to participate in the F-block auction. We believe that all those arguing for stricter eligibility rules miss the key point: eligibility is not the problem. Rather, the problem is abuse of benefits intended to help small businesses. Because the availability of these benefits was tied to bidders' initial eligibility status, bidders who were structured, in effect, as "fronts" for large, moneyed interests were able to take advantage of substantial financial benefits intended for small businesses, thus driving prices bid for C-block licenses beyond the reach of truly small businesses.

RAA maintains that the only effective way to minimize this sort of abuse of the rules is to tie benefits to the behavior of bidders. Given the magnitude of capital resources needed to build out and operate systems supporting large numbers of subscribers, we believe that any bidder intending to serve more than five million POPs should not be considered a "small business" and, therefore, should not be eligible for

¹ *Competitive Bidding Fifth Memorandum Opinion and Order* at para. 2, 12.

² 47 U.S.C. Sec. 309(j)(3)(B).

small-business benefits, such as bidding credits and installment payment plans. In addition, we strongly support Airlink's proposal that the cap on licenses be replaced by a cap of 27 million POPs on bidding eligibility and license acquisition in the F-block auction.³

In these Reply Comments, we also support those who propose extending the benefits available to small businesses in the C block to those same entities in the F-block auction. In addition, we support proposals to extend these benefits to small businesses bidding in the D- and E-block auctions, as well. We reiterate that any bidder in any auction winning licenses covering more than five million POPs should become ineligible for any of the benefits intended for small businesses.

We support those who argue that current spectrum aggregation rules, including the cellular/PCS cross-ownership rules, be maintained in their current status. We agree that any changes to these rules at this point in time would invite legal challenges and further delay the awarding of PCS licenses.

We refute the arguments of those who suggest that the F-block licenses be auctioned after the D- and E-block licenses. We do not disagree with those who propose concurrent auctions for the D, E, and F licenses, so long as the F-block auction is kept structurally separate from the D- and E-block auction(s). We reiterate our main point that in no case should the F-block auction be allowed to fall after the D- and E-block auction(s).

II. Eligibility Rules Cannot Solve the Problem

As the experience in the C-block auction has clearly demonstrated, eligibility rules are woefully inadequate as a means of insulating smaller applicants from bidding supported by the vast financial resources of large corporate entities.⁴ As other commenters have pointed out, of the 254 initial bidders for the C block, all but two qualified for "small business" benefits.⁵ Yet, as of Round 90, one bidder, NextWave, Inc., held high bids on licenses in 51 markets, with a total liability (after discount) of over

³ Comments of Airlink, L.L.C.

⁴ *Competitive Bidding Fifth Memorandum Opinion and Order* at para. 8.

⁵ Comments of Point Enterprises, Inc. at 2; US West Comments at 3.

\$4 billion, while the second-highest bidder held high net bids totaling \$1.4 billion.⁶ Furthermore, of the 52 BTA markets with populations of 1 million or more, 40 were won by four bidders, whose total winning bids amounted to more than \$7.3 billion.⁷

Experience in the C-block auction clearly demonstrates that large, moneyed interests will find ways to meet any particular requirements that can make them eligible for financial benefits. NextWave, for example, candidly admits that it was "structured to comply with the FCC regulations governing small business enterprise".⁸ That a "small business enterprise" could command financial resources not only to cover more than \$40 billion in license fees, but also the several billion dollars in capital expenditures needed to build and operate systems covering more than 90 million POPs defies common sense. That a company with access to this kind of financial resources should be able to receive benefits from financial arrangements intended to assist small firms who would otherwise face significant obstacles to raising capital⁹ shows how eligibility rules can be abused by players with ample resources.

RAA has suggested a simple method to minimize the potential for such abuse. In our initial comments¹⁰ we proposed that any bidder winning licenses covering more than five million POPs in total in the F block not be permitted to take advantage of the benefits intended for "small businesses" (specifically, bidding credits and installment payment plans). We also proposed that these "small business benefits" be extended to small business entities bidding in the D- and E-block auctions, as well, subject to the same five-million POP limitation.

By making "small-business benefits" subject to a limit on the total number of POPs, the Commission will prevent a small number of heavily-capitalized firms from using the government's generous financing arrangements to dominate the remaining broadband PCS auctions. At the same time, these financial benefits can still be available to those truly small, entrepreneurial entities intending to serve only modest populations.

⁶ Comments of Airlink, L.L.C. at 5, 8.

⁷ Comments of Point Enterprises, Inc. at 2.

⁸ Comments of NextWave Telecom, Inc. at 1.

⁹ *Fifth Report and Order, FCC 94-178 at para. 131-140.*

¹⁰ Comments of Rendall and Associates at 6-7.

We are convinced that this approach would go far toward supporting Congress's mandate and the Commission's intention to provide meaningful opportunities for small businesses to participate in the PCS business, while at the same time preventing large, moneyed interests from taking advantage of preferential financial benefits.

In lieu of a five-million-POP cap on eligibility for small-business benefits--or in addition to such a cap--RAA supports the proposal by Airlink, L.L.C. to impose a cap on bidding eligibility and license acquisition.¹¹ In Exhibit A attached to its comments, Airlink clearly demonstrates why a limit on POPs would be much more effective than a limit on licenses (i.e., BTAs) in discouraging concentration in the PCS business.¹²

If small businesses are truly to have a meaningful opportunity to participate in the remaining broadband PCS auctions, it is of paramount importance that the Commission shift the focus from eligibility rules to the behavior of bidders. We do not believe that eligibility rules can be designed to effectively insulate small bidders from the financial resources of large corporations. Nor do we believe that companies necessarily should be precluded from acquiring licenses covering large numbers of POPs. We simply maintain that large, well-financed bidders should not be allowed to take advantage of benefits intended for truly small companies.

III. Bidding Credits and Installment Payment Options Should be Extended to Small Businesses Participating in the D-, E-, and F-Block Auctions

RAA agrees with those commenters who proposed that the provisions making bidding credits and installment payment plans available to small business bidders in the C-block auction be extended to these same companies if they wish to bid in the F-block auction. In addition, we agree that these benefits should be extended to small business bidders who wish to bid for D, and/or E block licenses, as well.¹³ We emphasize that in all of these auctions, small business benefits should be available only to those winning licenses covering five million POPs or less.

¹¹ Comments of Airlink, L.L.C. at 4-8.

¹² *Id.*, Exhibit A.

¹³ RAA also supports comments arguing for a 10 percent downpayment for winning small-business bidders.

Because truly small players were precluded from meaningful participation in the C-block auction, it is imperative that they have reasonable opportunities to acquire licenses in the 10 MHz blocks. As the Chief of the Commission's Wireless Bureau has noted, "small businesses play an important role in creating job opportunities and innovation in the marketplace."¹⁴ Clearly, small businesses should be insulated from the financial resources of large corporations, to the extent possible, in at least one of the 10 MHz blocks (presumably, the F block). Moreover, if the Commission really wishes to encourage participation by small business entities, it will extend provisions for bidding credits, installment payment plans, and reduced downpayments to these companies if they wish to bid for licenses in the D and/or E blocks.

Some commenters questioned the value of making bidding credits and installment payment options available at all, and have argued that they should in any case not be made available to D and E block bidders.¹⁵ US West has argued that the availability of bidding credits and installment payment options to some bidders in these auctions "will skew the auction results" and "will also result in the award of licenses to entities that do not place the highest value on those licenses."¹⁶ In an attachment to its comments, US West argues that such provisions distort the "use value" of PCS licenses, which will lead to economically inefficient use of the PCS spectrum.¹⁷

We reply that there are many factors which might influence the "use value" of PCS licenses and that the history of telecommunications provides many examples of "social goals" taking precedence over "economic efficiency". It may be true, in theory, that those who value an asset the most, as demonstrated by their willingness to pay the most for it, are likely to make efficient use of it. However, in reality, other factors may complicate the issue. For example, the firm that may truly value the asset the most may not have the ability to pay the most for it. Also, the highest "use value" that a firm might place on an asset might come from not using it, but rather letting it lie fallow so that others could not use it in competition with the firm. Likewise, value might come from cost savings arising from not having to relocate incumbent microwave operators in other PCS bands.

¹⁴ Michele C. Farquhar, quoted in Comments of Omnipoint Corporation at 3.

¹⁵ See, e.g., U S West Comments at 1-2.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at Exhibit A.

Furthermore, a bidder might be willing to pay far more than the "stand-alone" use value of an asset if that bidder saw a greater "strategic value" to the asset as it related to other business ventures. For example, bidding activity for the C-block licenses suggests (to one analyst, at least) that bid prices were unrealistic for companies whose business plans addressed only the US market.¹⁸ In other words, bid prices were driven to unexpectedly high levels by global corporations who expected to lose money competing in the US markets, but saw experience in US markets as a prerequisite to recovering their investments through offshore markets.¹⁹

RAA does not believe that "social goals" and "economic efficiency" are necessarily mutually exclusive. Congress has given the Commission a "social goal" which, in fact, can help promote "economic efficiency". Specifically, Congress has directed the Commission to ensure that small businesses and rural telephone companies are given meaningful opportunities to participate in the PCS business.²⁰ We believe that a healthy environment for small business entrepreneurs and rural telephone companies will satisfy both objectives. Because small businesses and rural telephone companies did not have meaningful opportunities to participate in the C-block auction, it remains incumbent upon the Commission to remedy this shortcoming through the 10 MHz auctions.

We agree with commenters like US West that the availability of bidding credits and installment payment plans has "skewed" the results of the C-block auction. However, we maintain that this has been because there was no check on the ability of large, heavily-financed global corporations to "structure" control groups to take advantage of these "small-business" benefits. Because we believe that our proposal to limit the availability of these benefits to those winning licenses covering only five million POPs or less, we argue that the Commission (by revising its rules modestly) can improve opportunities for true small business entities, while ensuring that such bidders cannot "[shut] non-credited bidders out of an auction".²¹

¹⁸ Brian Deagon, "U.S. Auctions Are Just Start For PCS Players," *Investor's Business Daily*, April 18, 1996 A8.

¹⁹ *Id.*

²⁰ 47 U.S.C. Sec. 309(j)(3)(B).

²¹ US West Comments at 3

IV. The Cellular/PCS Cross-Ownership Rules Should Not Be Changed

Predictably, those commenters who argued for relaxing the cellular/PCS cross-ownership rules were either those who had cellular operations, or those who had already won 30 MHz PCS licenses. One commenter in this category, Sprint Corporation, rightly argued that "[l]iberalizing the rules at this stage not only could seriously disadvantage entities who made business decisions in those auctions based on the existing caps; it also would create an open invitation to legal challenge".²² We agree and reiterate three specific points from our initial comments: (1) in *Cincinnati Bell*²³ the court recognized that the Commission's goal of avoiding excessive concentration of licenses was a permissible objective, (2) any such spectrum aggregation rule will likely be challenged as arbitrary by those intent on aggregating as much spectrum as possible, and (3) any relaxation in the spectrum aggregation limits would reduce opportunities for smaller companies to participate and result in a reduction in the number of competitors--and the potential for meaningful competition--in the wireless market.²⁴

Absent an inquiry or other formal proceeding to assess the potential for and implications of concentration in the wireless industry, it would be impossible for any agency to say what level of aggregation might be reasonable. In establishing the entrepreneurs' blocks, the Commission determined that the public interest benefits of making spectrum available for smaller players outweighed the need to provide additional opportunities for cellular operators.²⁵ Any changes to the spectrum aggregation limits at this point, would most likely invite legal challenges and involve substantial delays in the auctioning of the remaining PCS licenses.

²² Comments of Sprint Corporation at 9.

²³ *Cincinnati Bell*, 69 F.3d at 764; *Notice of Proposed Rule Making*, FCC 96-119 at para. 65.

²⁴ Comments of Rendall and Associates at 11-12.

²⁵ *Competitive Bidding Fifth Memorandum Opinion and Order* at para. 16.

V. In No Case Should the D- and E-Block Auction(s) be Allowed to Precede the F-Block Auction

Most commenters suggested that the D-, E-, and F-blocks licenses be auctioned simultaneously, but that the F-block auction be structurally separate from the D-/E-block auction(s). Several commenters, most notably those who already held cellular or 30 MHz PCS licenses, suggested that the F-block auction should follow the D-/E-block auction(s). In our initial comments, we argued that the F-block auction should precede the auction(s) for the other two blocks, but that in no case should it be allowed to follow the D and E auction(s).

We agree that concurrent auctions for the D, E, and F blocks might be appropriate--so long as the F-block auction is kept structurally separate. However, we find the comments of those proposing that the F block be auctioned last to be self-serving and incomplete. For example, some commenters in the second camp suggested that delaying the F-block auction until after the D and E blocks have been auctioned would provide "helpful information" to F-block bidders regarding the value of these licenses.²⁶ One must wonder whether the information from the A- and B-block auctions was "helpful" in this respect to the C-block bidders.

Other commenters suggested that scheduling the F-block auction to follow the D and E auctions would give F-block bidders additional time to secure financing and provide opportunities to form partnerships with unsuccessful D and E bidders.²⁷ In several cases, commenters argued that the F-block auction should be scheduled after the D- and E-block auctions so that any legal challenges to the F-block rules not be allowed to delay the auctioning of the D and E blocks.²⁸

We make two points in reply. First, the so-called "competitive advantage of time" may be somewhat overstated. Latecomers will benefit from earlier efforts by PCS market pioneers to educate the public about PCS (through advertising), and they will most likely pay lower prices for infrastructure components (which will have moved down the cost curve because of volume and improved production efficiencies). Second, any

²⁶ See, e.g., US West Comments at 7.

²⁷ See, e.g., Comments of Sprint Corporation at 8.

²⁸ *Id.*

benefits of "information" or additional time to secure financing would be wiped out by the "desperation bidding" likely to result as all players fought to stake claims to the very last licenses to be awarded. Many observers suspect that such "desperation" for the last remaining 30 MHz licenses was a factor in driving prices so high in the C-block auction. To allow this to happen in the F block would be to deprive small businesses one more time of meaningful opportunities to acquire PCS licenses. If the Commission does not see fit to auction the F-block licenses before the D and E blocks, it should at least ensure that the F-block auction does not happen after the D- and E-block auction(s).

VI. Conclusion

The Commission now has an opportunity to remedy the flaws in the C-block rules which allowed large, moneyed interests to dominate that auction and to thwart the Commission's efforts to meet its Congressional mandate to provide meaningful opportunities to small businesses and rural telephone companies to participate in broadband PCS, to disseminate licenses among a wide variety of applicants, and to avoid excessive concentration of licenses.

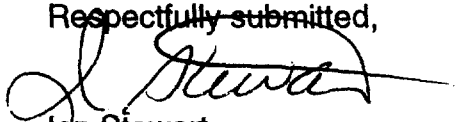
The Commission can continue to make bidding credits, installment payment options, and reduced downpayment benefits available to small businesses, while preventing the abuse of these provisions by those with ample financial resources, by imposing a limitation on the number of POPs a bidder can win and still qualify for these benefits.

The extension of these benefits to small businesses who wish to bid in the D and E block auction(s), as well as the F block auction, can further enhance opportunities for small players to acquire licenses, without adversely impacting the ability of large players to bid for the licenses they value most.

We agree that expeditious awarding of the 10 MHz licenses will benefit everyone. Therefore, we argue that the spectrum aggregation rules remain unchanged and that the F block auction be held prior to or concurrent with the D and E block auction(s).

The new telecommunications environment is ripe with opportunity. The Commission is to be commended for its tremendous efforts in moving the industry as quickly as practical into a new market paradigm. By adopting a few modest changes to its 10 MHz PCS auction rules, the Commission can achieve a fair balance of goals and interests and move the industry significantly further along the road to implementation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ian Stewart', with a long horizontal flourish extending to the right.

Ian Stewart
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